(1)

92-48

No.

Supreme Court, U.S.
FILED
JUL 7 1992
OFFICE OF THE CLERK

IN THE
Supreme Court of the United States

OCTOBER TERM, 1991

FREDERICK C. FERMIN,
Petitioner,

vs.

U.S. OFFICE OF PERSONNEL MANAGEMENT,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES OF APPEALS FEDERAL CIRCUIT

PETITION FOR WRIT OF CERTIORARI

FREDERICK C. FERMIN, PRO SE
13906 NORLAND DRIVE
SAN ANTONIO, TEXAS 78232-4921
Telephone #: (512) 494-0728

QUESTIONS PRESENTED FOR REVIEW

1. Is the cited case by the U.S. Court of Appeals appendix page 8a, second paragraph in reference to the cas of McEachern v. Office Personnel Management, 776 F.2d 1539, 1544 in direct conflict with the case of Stouper v. Jones, 284 F.2d 240, and with Horner v. Benedetto, 847 F.2d 814, also with Crawford v. United States 609 F.2d 1185?

2. Does Public Law 91-658; 84 Stat. 1961, apply to petitioner upon the election of a survivor annuity on April 1971?

3. Does the survivor annuity have a legal choice to claim for increase annuity upon petitioner's death?

4. What legal right does the petitioner have pursuant to 5 U.S.C. Section 8332 (c), regarding petitioner's military service-connected disability during World War II?

5. Is the use of military service by the respondent OPM, to benefit or to penalize the petitioner?

TABLE OF CONTENTS

PAGE

Questions Presented for Review i

Table of Contents ii

Parties to the Proceeding iii

Citations of Authority iv

Opinions below As Per Rule 14 (d) 1

Opinion below As Per Rule 14 (e) 2

JURISDICTION 2

Constitutional and Statutory Provisions Involved ... 2

Statement of The Case 3

Explanations and Sound Reasons for Granting the Writ of Certiorari as per Rule 14 (j) 7

Conclusion 9

Appendix 1a

PARTIES TO THE PROCEEDING

RULE 14 (b)

Frederick C. Fermin
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(Appellant and Petitioner below Pro Se)

U.S. Office of Personnel Management

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Commerical Litigation Branch
Department of Justice
Attn: Classification Unit
2nd Floor, Todd Bldg.
Washington, D.C. 20530
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Merit Sytems Protection Board
1120 Vermont Avenue, N.W. Suite 802
Washington, D.C. 20419

Agency's Representative

Ms. Connie E. Torrillo
Retirement Policy Division
Office of Personnel Management
Employee Relations Division
P.O. Box 16
Washington, D.C. 20044

CITATIONS OF AUTHORITY AS PER RULE 14 (c)

	PAGE
Chevron Oil Company v. Huson, 404 U.S. 97, 30 L Ed 2d 296, 92 S. Ct. 349	3
Crawford v. United States, 609 F. 2d 1185 (5th Cir. 1980)	i
Horner v. Beneditto, 847 F. 2d 814 (Fed. Cir.)	i
McEachern v. Office of Personnel Management 776 F. 2d 1539 (Fed. Cir.)	3
Randolph v. United States, D.C.N.C. 88 S. Ct. 695, 389 U.S. 570, 19 L. Ed. 2d 785	4
Stouper v. Jones, 284 F. 2d 240 (D.C. Cir.)	3
Title IV of Public Law 84-854, Act of July 31, 1956	3-4-6
Public Law 89-504; Section 505, 80 Stat. 301 Act of July 18, 1966	3
Public Law 91-658; 84 Stat. 1961 Act of January 8, 1971	3-6-9
5th Amendment of the United States Consitiution	8
United States Code Title 5, Sections:	
7703 (b) (1)	2
8332 (c)	4
8332 (e)	4
8333 (a)	5
8333 (b)	5
8334 (e)	4-5
8337 (a)	5
8339 (g)	3
8341 (b) (1)	3
8341 (d)	6
United States Code Service Title 5, Section 8339	3-5
United States Code Title 28, Section 1254 (1)	2-5
Code of Federal Regulation Title 5, Section 831.303 (a)	4-7

OPINIONS BELOW
RULE 14 (d)
INDEX TO:

		PAGE
Appendix A -	A suggestion For Rehearing in banc	1a-2a
Appendix B -	Judgement issued as a mandate: May 11, 1992	3a
Appendix C -	Order denying petition for rehearing dated May 4, 1992	4a
Appendix D -	United States Court of Appeals Federal Circuit decided case on April 8, 1992	5a
Appendix E -	U.S. of America Merit Systems Protection Board, denying petition for review on August 27, 1991	10a
Appendix F -	Initial Decision by the Administrative Law Judge denying appellant's appeal on May 30, 1991	14a
Appendix G -	Office of Personnel Management Certification, of using petitioner's military service Form SSA-655 dated 9-8-71	23a
Appendix H -	Application For Retirement and Evidence of military service-connected disability	24a-25a
Appendix I -	Original Receipt For Payment with United States Court of Appeals for purpose to certify date	26a
Appendix J -	Amendment 5, To The United States Constitution	27a

OPINION BELOW

Rule 14 (e)

(i) The date of judgement of the United States Court of Appeals Federal Circuit, was on May 11, 1992 which is within the time limit pursuant to Rule 13(4). See appendix B, appendix page 3a.

(ii) The petitioner's petition for rehearing was denied on May 4, 1992. See appendix C, appendix page 4a.

(iii) This section is for respondent OPM.

(iv) The statutory provision believed to confer on this court jurisdiction to review the judgement for writ of certiorari:

United States Code Title 28 Section 1254 (l).

JURISDICTION

See above paragraphs and see Statement of The Case reference to Rule 14 (i), page 6, and appendix B.E.I., appendix pages 3a, 10a, and 26a. United States Code Title 28, Section 1254 (l). 5 U.S.C. Section 7703 (b) (1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

See appendix J, appendix page 27a.

STATEMENT OF THE CASE

As per Rule 14 (g), the following paragraphs are to questions presented for review paragraphs, i.e. each number shall correspond as the petitioner's unofficial answer for simplicity:

1. Pension granted by government confers no right which cannot be revised, modified or recalled by subsequent legislation. Stouper v. Jones, 284 F.2d 240 (D.C. Cir. 1960). The U.S. Court of Appeals decision appendix page 8a, reads:

> "The computation of petitioner's disability retirement annuity, and the benefits derived therefrom, is governed by the statutory framework in existence at the time of his retirement." McEachern v. Office of Personnel Management, 776 F.2d 1539, 1544 (Fed. Cir. 1985)

The case of Stouper v. Jones, and the case of McEachern v. Office of Personnel Management are with out doubt in direct conflict concerning the petitioner's election of a survivor annuity, pursuant to **United States Code Service Section 8339,** that certify that the application does not compel retroactive computation of annuity pursuant to Civil Service Retirement Amendents Act of 1956, (Title IV of Public Law 84-854, Section 9 (a). See Chevron Oil Co. v. Huson, 404 US 97, 30 L Ed 2d 296, 92 S Ct 349. Special reference is made to the above case page 299, paragraph 11, regarding Courts Section 777.5.

2. Public Law 89-504, Section 505, 80 Stat. 301 **dated July 18, 1966,** created 5 U.S.C. Section 8339 (g). Therefore, the statutes that apply for the election of survivor annuity is 5 U.S.C. Section 8341 (b) (1), and 8339 (g), as amended by Public Law 91-658; 84 Stat. 1961 (b) and (c), upon the petitioner's application for a survivor annuity pursuant to **5 U.S.C.S.** Section 8339.
3. The petitioner was not married upon his disability retirement in 1957. On October 7, 1966, petitioner married Petra Villares de Fermin. In January 1971,

the petitioner made application for a survivor annuity pursuant to **5 U.S.C.S. Section 8339.**

4. It is the opinion of the petitioner that the survivor annuity upon the petitioner's death, must make a decision upon application for death benefits pursuant to 5 C.F.R. Section 831-303 (a), because the petitioner obtained a refund in 1956. The survivor does not have to pay any interest on the petitioner's refund pursuant to 5 U.S.C. Section 8334 (e).
5. The intent of the United States Congress was not to penalize the veterans, particular veterans with military service-connected disability caused by World War II, pursuant to 5 U.S.C. Section 8332 (c). The respondent OPM, and the Administrative Law Judge, also the Merit Systems Protection Board, and the U.S. Court of Appeals, failed to notice in the Application For Retirement Standard Form No. 2801 that the petitioner has a military service-connected disability during World War II, see appendix page 24a and 25a. Therefore, for the foregoing above certified information, respondent OPM should have not reported to the Social Security Administration that petitioner's military service was being used for the survivor annuity on Form SSA-655 dated 9-8-71, see appendix page 23a, because petitioner is legally entitled to dual annuity based on computation of the same period of military service, pursuant to 5 U.S.C. Section 8332 (c), and the fact the Veterans Administration does not use the military service for computation of petitioner's VA compensation. See 5 U.S.C. Section 8332 (e). "The interest of a social security benefits claimant in obtaining such benefits as may be due him is of sufficient substance as to fall within protection from arbitrary government action afforded by due process clause of U.S.C.A. Const. Amend. 5. Randolph v. U.S., D.C.N.C. 1967, 274, F. Supp. 200, affirmed 88 S. Ct. 695, 389 U.S. 570,19 L Ed. 2d 785".

The authority for the petitioner's 1957 disability retirement are sections 3 (g) and 7 (a) also 9 (a) of Civil Service Retirement Amendment Act of 1956 (Title IV of Public Law 84-854, dated July 31, 1956). The requirement for the "guaranteed minimum" annuity of 40 percent of average salary is one year of creditable civilian service "like insured status", purusant to 5 U.S.C. Section 8333 (b), and the refund years of noncreditable civilian service which are not to be used for computation of annuity, the refund years are just to satisfy the 5 years requirement pursuant to 5 U.S.C. Section 8333 (a) and 8337 (a.)

The petitioner only has 2 years 3 months and 3 days of creditable civilian service for computation "like insured status" which shall suffice for the election of a survivor annuity pursuant to 5 U.S.C. Section 8341 (d), as amended by Public Law 91-658; 84 Stat. 1961 (c). Therefore, for respondent OPM to use petitioner's military service is useless and gross injustice, based on the fact there is no need for computation of any service beyond 1 year requirement pursuant to Section 3 (g) of Title IV Public Law 84-854 Act of 1956 and the refund years as required by Section 7 (a) of the above Public Law. To establish eligibility for the election of a survivor annuity in 1971 is the information in 5 U.S.C.S. Section 8339.

Rule 14 (i), request that if review of a judgment of a United States court of appeals is sought, the statement of the case shall also show the basis for federal jurisdiction in the court of first instance which is 5 U.S.C. Section 7703 (b) (1). The petition for review with the United States Court of Appeals Federal Circuit, was timely filed on September 4, 1991. However, the original receipt for payment certify the date as being on 9-6-91. See appendix E, appendix page 10a to confirm time limit of 30 days. Also see appendix I, appendix page 26a.

ARGUMENT

As per rule 14 (j), the following information shall be for the paragraphs in the statement of the case, i.e. each number will correspond as petitioner's argument for simplicity:

1. The information in the statement of the case paragraph 1, verify that the petitioner has legal points of authority that are grounds to grant the petitioner's request for petition for writ of certiorari, as stated in Rule 10 (a).
2. The United States Court of Appeals failed to mention in the decision under what authority petitioner made application for the election of survivor annuity in 1971, which is the key to the whole case.
3. It was the responsibility and obligation of respondent OPM to notify the petitioner of the choice that has to be made pursuant to 5 U.S.C. Section 8339 (i) 5 C.F.R. Section 831-303 (a), because of the petitioner's refund in 1956.
4. The evidence which is the petitioner's Application For Disability Retirement Standard Form No. 2801, certify that petitioner has a military service-connected disability during World War II, and this evidence should suffice for **dual annuity** with respondent OPM and with the Social Security Administration, concerning DUE PROCESS CLAUSE of U.S.C.A. Const. Amend. 5. See appendix page 24a, 25a and 27a.
5. The petitioner has been penalized by using his military service since September 8, 1971, which is gross injustice based on the fact the pending death of petitioner is not 100 percent sure before his survivor.

Therefore, for the foregoing above paragraphs and the questions presented for review paragraphs, also the statement of the case paragraphs, are excellent explanations and good reasons for granting the petition for writ of certiorari.

CONCLUSION

Gentlemen and the lady of the most honorable Court. It is without doubt that the case of Stouper v. Jones, 284, F. 2d 240 (D.C. Cir. 1960) and the case of McEachern v. Office of Personnel Management, 776 F. 2d 1539, 1544 (Fed. Cir. 1985), are in direct conflict. Therefore, for the foregoing explanation, and the documents as per the Rules of this Court, the certiorari should issue to review the judgment and the decision also opinion of the United States Court of Appeals, for the interest of justice, based on the fact this case can set a precedent for future litigations, on the issue of due process clause of U.S.C.A. Const. Amend. 5, concerning the use of military service for survivor annuity and the issue of the "guaranteed minimum" annuity. With-out 5 U.S.C. Section 8339 (a)through (h) in reference to Public Law 91-658; Stat. 1961 (b) Section 8341 (b) and (b) (1), upon election of a survivor in **1971,** the petitioner's argument would be barred. The petitioner is hoping that the honorable Court will grant the petition for writ of certiorari.

Respectfully submitted,
Frederick C. Fermin, Pro Se
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Telephone # (512) 494-0728

APPENDIX

United States Court of Appeals for the Federal Circuit

91-3562

FREDERICK C. FERMIN,

Petitioner,

v.

OFFICE OF PERSONNEL MANAGEMENT,

Respondent.

ORDER

ORDER

A suggestion for rehearing in banc having filed in this case,

UPON CONSIDERATION THEREOF, it is

ORDERED that the suggestion for rehearing in banc be, and the same hereby is declined.

FOR THE COURT,

Francis X. Gindhart

Francis X. Gindhart
Clerk

Dated: May 19, 1992

cc: FREDERICK C. FERMIN
JOHN K. LAPIANA

FERMIN V OPM, 91-3562

FILED
U.S. COURT OF APPEALS FOR
THE FEDERAL CIRCUIT

MAY 19 1992

FRANCIS X. GINDHART
CLERK

(MSPB DA08319110258

NOTE: Pursuant to Fed. Cir. R. 47.8, this order is not citable as precedent. It is a public record.

United States Court of Appeals for the Federal Circuit

91-3562

FREDERICK C. FERMIN,

Petitioner,

v.

OFFICE OF PERSONNEL MANAGEMENT,

Respondent.

Judgement

ON APPEAL from the Merit Systems Protection Board
in CASE NO(S) DA08319110258
This CAUSE having been heard and considered, it is
ORDERED and ADJUDGED: Affirmed

ENTERED BY ORDER OF THE COURT

Francis X. Gindhart

Francis X. Gindhart, Clerk

DATED APR -8 1992

ISSUED AS A MANDATE: May 11, 1992

ORDER

Before NEWMAN, Circuit Judge, COWEN, Senior Circuit Judge, and MICHEL, Circuit Judge.

A petition for rehearing having been filed in this case, UPON CONSIDERATION THEREOF, it is ORDERED that the petition for rehearing be, and the same hereby is, denied.

The mandate will issue on May 11, 1992.

FOR THE COURT,

Francis X. Gindhart
Clerk

Dated: May 4, 1992

cc: FREDERICK C. FERMIN
JOHN K. LAPIANA

FILED
U.S. COURT OF APPEALS FOR
THE FEDERAL CIRCUIT
MAY 5 1992
FRANCIS X. GINDHART
CLERK

FERMIN V OPM, 91-3562
(MSPB - DA08219110258

NOTE: Pursuant to Fed. Cir. R. 47.8, this order is not citable as precedent. It is a public record.

NOTE: Pursuant to Fed. Cir. R. 47.8, this disposition is not citable as precedent. It is a public record. The disposition will appear in tables published periodically.

United States Court of Appeals for the Federal Circuit

91-3562

FREDERICK C. FERMIN,

Petitioner

v.

OFFICE OF PERSONNEL MANAGEMENT,

Respondent.

DECIDED: April 8, 1992

Before NEWMAN, **Circuit Judge,** COWEN, **Senior Circuit Judge,** and MICHEL, **Circuit Judge.**

PER CURIAM

DECISION

Petitioner appeals from the final decision of the Merit Systems Protection Board (MSPB or Board) in docket number DA08319110258, which upheld the Office of

Personnel Management's (OPM) determination that his military service performed prior to January 1, 1957, could not be excluded in computing his benefits under the Civil Service Retirement Act (CSRA). We **affirm.**

DISCUSSION

Petitioner retired from federal service on June 30, 1957, and received a retirement disability annuity beginning on September 4, 1957. Petitioner had a total of 7 years, 4 months, and 29 days of creditable service, which included 5 years, one month, and 26 days of prior military service. In 1971, petitioner contacted the then Civil Service Commission (CSC) to elect a survivor annuity for his spouse. Effective April 1, 1971, petitioner's application was granted in an order in which CSC computed his survivor's annuity on the basis of all of his creditable serivce, including military service.

Petitioner subsequently applied for Social Security benefits based on his military service. The CSC advised the Social Security Administration (SSA) that the petitioner's military service was being used for CSRA benefits. Under the Social Security Act , 42 U.S.C. § 301 **et seg.,** an applicant may not receive wage credits for military service performed before January 1, 1957, if another federal agency has already granted him benefits based on that military service. Consequently, the SSA found petitioner ineligible for Social Security benefits.

Petitioner protested the inclusion of his military service in the computation of CSRA benefits. OPM advised petitioner that it was required by law to credit his military service for civil service retirement purposes and that the removal of his military service from annuity compensation would adversely affect his survivor's annuity. On reconsideration, OPM affirmed its decision.

Petitioner appealed the OPM decision to the MSPB, which treated his appeal as a request to delete his military service from the computation of his annuity. The Administrative Judge (AJ) determined that petitioner failed to prove that OPM was not required to include his military service in his annuity credit and affirmed the OPM decision.[1] The decision of the AJ became final after the full Board denied Mr. Fermin's petition for review.

II.

Petitioner contends that OPM erroneously and negligently advised the Social Security Administration that his military service was used in computing his survivor's annuity. Petitioner argues that OPM did not need to consider his military service in computing his survivor's annuity, because he was entitled to a "guaranteed minimum" annuity rate under 5 U.S.C. § 8339 and therefore the addition of his military service did not increase the amount of his retirement benefits from which his survivor's annuity was derived.

III.

Section 8341 (b) of Title V provides that: "if an employee...dies after having been retired under this subchapter and is survived...by a widow or widower whom he married after retirement, the spouse, widow, or widower is entitled to an annuity equal to 55 percent, or 50 percent if retired before October 11, 1962, of **an annuity computed under section 8339 (a) - (i)** (emphasis added)..." Under this section, petitioner is entitled to a survivor annuity for his spouse equal to 50 percent of his own retirement annuity, calculated in accordance with § 8339.

---

[1] Apparently, the AJ characterized this issue as a question of fact. However, we are called upon to interpret the statutory provisions of the CSRA and are therefore presented with questions of law.

The computation of petitioner's disability retirement annuity, and the benefits derived therefrom, is governed by the statutory framework in existence at the time of this retirement. **See e.g. McEachern v. Office Personnel Management,** 776 F. 2d 1539, 1544 (Fed. Cir. 1985). Since petitioner retired in 1957, his benefits were calculated under the Civil Service Retirement Act of 1930, as amended by the Civil Service Retirement Amendments of 1956 (Title IV of Public Law 84-854, July 31, 1956). Section 9 (a) of the Act provided[2] as follows:

> (e)xept as otherwise provided in this section, the annuity of an employee retiring under this Act shall be (the earned rate)...Provided...(t)hat the annuity of an employee retiring under section 7 (disability retirement) shall be at least (1) 40 per centum of the average salary or (2) the sum obtained under this subsection after increasing his total service by the period elapsing between the date of separation and the date he obtains the age of sixty years, whichever is the lesser, but **this proviso shall not increase the annuity of any survivor** (emphasis added).

In accordance with this section, petitioner received a retirement disability annuity equal to 40 percent of his average salary, since his "earned rate[3] would not provide him with a higher annuity. However, OPM could not base his survivor's annunity on the "guaranteed minimum"

---

[2] Section 9 (a) of the Act was originally codified in 5 U.S.C. § 2259 (a). In 1966, the proviso contained in the last sentence of 5 U.S.C. § 2259 (a) was recodified in § 8339 (f). The Civil Service Retirement Amendents of 1969 deleted this proviso from § 8339 (f) but this change did not apply to federal employees who, like petitioner, retired prior to October 20 ,1969. This section was subsequently redesignated § 8339 (g) in 1972.

[3] An "earned" annuity rate is the rate that petitioner was entitled to based on his actual service time.

retirement disability annuity he received under § 9 (a) because that section could not be used to "increase the annuity of any survivor." Rather, § 9 (a) of the Act, when read in conjunction with 5 U.S.C. § 8341 (b), required that a derivative survivor annuity be computed under an "earned" rate irrespective of whether a retiree receives a disability retirement annuity based on the "guaranteed minimum" or the "earned" rate. OPM was therefore required to calculate petitioner's survivor annuity based on his "earned" rate, which included his creditable military service. **See** 5 U.S.C. § 8332 (c). Thus, OPM correctly advised petitioner that his survivor's annuity would be adversely affected if his military service was not used in calculating survivor benefits. Since petitioner's survivor annuity would be adversely affected by deleting his military service from annuity compensation, clearly his military service was in fact used by OPM. OPM therefore did not err in denying petitioner's request to delete his military service from the computation of his survivor's annuity.

IV.

After a careful study of the pertinent statutory provisions and the supplemental briefing of the parties, we find that OPM properly included petitioner's military service in the computation of his survivor's annuity.[4] We therefore conclude that the decision of the MSPB was not arbitrary, capricious, an abuse of discretion, unsupported by substantial evidence, or otherwise not in accordance with law. **See** 5 U.S.C. § 7703 (c) (1988). Accordingly, the decision of the Board must be sustained by this court. **True v. Office of Personnel Management,** 926 F. 2d 1151, 1153 (Fed. Cir. 1991).

---

[4] Since we hold that OPM was justified in refusing to delete petitioner's military service because the deletion would affect his survivor annuity, we need no consider OPM's contention that military service performed before January 1, 1957, must be used for civil service retirement purposes and cannot be credited toward Social Security benefits.

UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

FREDERICK C. FERMIN, Appellant,
v.
OFFICE OF PERSONNEL MANAGEMENT, Agency.

DOCKETT NUMBER
DA08319110258

(CSA) 482 317)

DATE: Aug 27 1991

Frederick C. Fermin, San Antonio, Texas, pro se.
Connie E. Torrillo, Washington, D.C., for the agency.

BEFORE

Daniel R. Levinson, Chairman
Antonio C. Amador, Vice Chairman
Jessica L. Parks, Member

ORDER

After full consideration, we DENY the appellant's petition for review of the initial decision issued on May 30, 1991, because it does not meet the criteria for review set forth at 5 C.F.R. § 1201.115. This is the Board's final order in this appeal. The initial decision in this appeal is now final. 5 C.F.R. § 1201.113 (b).

NOTICE TO APPELLANT

You have the right to request further review of the Board's final decision in your appeal.

Discrimination Claims: Administrative Review

You may request the Equal Employment Opportunity Commission (EEOC) to review the Board's final decision on your discrimination claims. See 5 U.S.C. § 7702 (b) (1). You must submit your request to the EEOC at the following address:

Equal Employment Opportunity Commission
Office of Federal Operations
P.O. Box 19848
Washington, D.C. 20036

You should submit your request to the EEOC no later than 30 calendar days after receipt of this order by your representative, if you have one, or receipt by you personally, whichever receipt occurs first. See U.S.C. § 7702 (b) (1).

Discrimination and Other Claims: Judical Action

If you do not request a review of this order on your discrimination claims by the EEOC, you may file a civil action against the agency on both your discrimination claims and your other claims in an appropriate United States district court. See 5 U.S.C. § 7703 (b) (2). You should file your civil action with the district court no later than 30 calendar days after receipt of this order by your representative, if you have one, or receipt by you personally, whichever receipt occurs first. See 5 U.S.C. § 7703 (b) (2). If the action involves a claim of discrimination based on race, color, religion, sex, national origin, or a handicapping condition, you may be entitled to representation by a court-appointed lawyer and to waiver of any requirement of prepayment of fees, costs, or other security. See 42 U.S.C. § 2000e5 (f); 29 U.S.C. § 794a.

Other Claims: Judicial Review

If you choose not to seek review of the Board's decision on your discrimination claims, you may request the United States Court of Appeals for the Federal Circuit to review the Board's final decision on other issues in your appeal if the court has jurisdiction. See 5 U.S.C. § 7703 (b) (1). You must submit your request to the court at the following address:

United States Court of Appeals
for the Federal Circuit
717 Madison Place, N.W.
Washington, D.C. 20439

The court must receive your request for review no later than 30 calendar days after receipt of this order by your representative, if you have one, or receipt by you personally, whichever receipt occurs first. See 5 U.S.C. § 7703 (b) (1).

FOR THE BOARD:

Washington, D.C.

Robert E. Taylor
Clerk of the Board

CERTIFICATE OF SERVICE

I certify that this ORDER was sent today:

By certified mail to:

Frederick C. Fermin
13906 Norland Drive
San Antonio, TX 78232

By regular mail to:

Connie E. Torrillo
Retirement Policy Division
Office of Retirement and Insurance Policy
P.O. Box 16
Washington, D.C. 20044

Marjorie Marks
Office of Personnel Management
Employee Relations Division
1900 E. Street, N.W., Room 7412
Washington, D.C. 20415

Merit Systems Protection Board
Dallas Regional Office
1100 Commerce Street, Room 6F20
Dallas, TX

By hand to:

Office of Special Counsel
1120 Vermont Avenue, N.W.
Washington, D.C. 20005

for Robert E. Taylor
Clerk of the Board

AUG 27 1991
(Date)
Washington, D.C.

UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD
DALLAS REGIONAL OFFICE

FREDERICK C. FERMIN, Appellant,
v.
OFFICE OF PERSONNEL MANAGEMENT, Agency.
(CSA) 482 317)

DOCKETT NUMBER
DA08319110258

DATE: May 30 1991

Frederick C. Fermin, San Antonio, Texas, pro se.
Connie E. Torrillo, Washington, D.C., for the agency.

BEFORE

U. Sidney Cornelius, Jr.
Administrative Judge

INITIAL DECISION

Frederick C. Fermin appealed the reconsideration decision of the Office of Personnel Management (OPM) which found that the military service he performed prior to December 31, 1956, must be included in the computation of his annuity credit. The Board has jurisdiction over this appeal pursuant to 5 U.S.C. § 8347 (d) (1) and 5 C.F.R. § 831.110 (1991). The appeal is decided on the basis of written submissions.

Based on the following analysis and findings, OPM's reconsideration decision is AFFIRMED.

ANALYSIS AND FINDINGS

The appellant bears the burden of proof that he is entitled to the retirement benefits that he seeks.

The record reflects the following: The appellant's application for disability retirement was granted on September 4, 1957. Because his pay ceased on June 30, 1957, his annuity commenced on July 1, 1957. The appellant had a total of 11 years, 1 month of creditable service. Appeal File, tab 5, subtab 2. The appellant, however, received a refund for 4 years, 5 months, and 17 days of his civilian service and, therefore, that service was not used in the computation of his civil service annuity. Accordingly, OPM computed the appellant's annuity based on the remainder of his service, a total of 7 years, 4 months, and 29 days of creditable service, which included 5 years, 1 month, and 26 days of military service.

The record further reflects that in 1971, the appellant contacted the Civil Service Commission (CSC)[1] about providing a survivor annuity for his wife. The CSC responded to the appellant's inquiry with the necessary calculations and certified the appellant's eligibility to elect a survivor annuity for his wife. Appeal File, tab 13. The appellant subsequently applied for Social Security benefits based on his military service. The CSC advised the Social Security Administration (SSA) that the appellant was receiving disability benefits and that his active military service was being used in computing those benefits. In the remarks section of the Form SSA-655, used by CSC to respond to the SSA's inquiry, CSC related:

> Military was used effective 4-1-71 with the annuitant (sic) election for survivor annuity which must be

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[1] CSC was the predecessor organization to OPM.

based on all of his service including his military even though his annuity is still a 40 percent guaranteed mimnimum. This revises our form CA*C655 dated 1-16-70. Appeal File, tab 5, subtab 6.

It appears that the appellant disagreed with CSC's inclusion of his military service in its computation because it made him ineligible to receive Social Security benefits based on that service and that he subsequently contacted his congressman. In its reply to a letter received from the appellant's congressman, OPM advised the appellant that credit for his military service from March 29, 1941, to September 17, 1945, and May 1946 to February 5, 1947, was used in the computation of his annuity. OPM further explained that it is generally required under the law to credit active duty military service to an annuity of a retired civilian employee, except in a few situations which were not applicable to the appellant. OPM stated that the law does not allow an individual to waive credit for his military service in a civil service annuity computation. Appeal File, tab 5, subtab 4.

By letter dated December 3, 1990, the appellant requested reconsideration of OPM's initial decision. Appeal File, tab 5, subtab 3. He indicated that the retirement law guaranteed that he would receive 40 percent of his average salary and that the exclusion of his military service should have no effect on his annuity; therefore, there should be no bar to the exclusion of his military service. The appellant argued that OPM improperly included his military service in the computation of his annuity. OPM's reconsideration decision affirmed its previous determination that the appellant's military service must be included in the computation of his annuity.

The appellant bears the burden of proof in this appeal of OPM's decision on his request that his military service performed prior to December 31, 1956, not be

included in his annuity credit. See 5 CFR. § 1201.56 (a) (2) (1990); *Chevez v. Office of Personnel Management*, 6 M.S.P.R. 404, 415 (1981). The appellant must demonstrate by a preponderance of the evidence that he is entitled to the benefit he seeks.[2]

The appellant has not shown that his military service performed prior to December 31, 1956, should not be included in his annuity credit.

In his appeal to the Board, the appellant asserted that OPM is barred from combining his military service with the "insured civilian employment" from February 28, 1956, to July 1, 1957, because Pub. L. No 84-854, Section 4 (d), states that "no credit shall be allowed for the service covered by the refund until the deposit is made." He asserted that the decision in *Tirado v. Department of the Treasury*, 757 F.2d 263 (1985) is the key to understanding his appeal.[3] Appeal File, tab 1. He requested the Board to require OPM to delete his military service from the computation of his annuity and to increase his survivor annuity to 50 per centum of his monthly payment. Appeal File, tab 1.

Pub L. No. 84-854, Section (3) (b), enacted July 31, 1956, states in pertinent part:

> An employee or Member shall be allowed credit for periods of military service prior to the date of the separation upon title to annuity is based...

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[2] A preponderence of the evidence is the degree of relevant evidence that a reasonable person, considering the record as a whole, would accept a sufficient to find that a contested fact is more likely true than untrue. 5 C.F.R. § 1201.56 (c) (2) (1991).

[3] Throughout the processing of the appeal, the appellant also raised numerous issues and assetions assertions not addressed in OPM's reconsideration decision. Because the Board does not have jurisdiction over those issues not considered by OPM, I have not addressed them in this decision.

OPM related that the actual computation of the appellant's civil service benefit is covered in Pub. L. No. 84-854, Section 9 (a), which states in pertinent part:

> ...annuity of an employee retiring under section 7 shall be at least (1) 40 per centum of the average salary or (2) the sum obtained under this subsection after increasing his total service by the period elapsing between the date of seperation and the date he attains the age 60 years, whichever is the lesser, but this provision shall not increase the annuity of any survivor.

OPM further related that military service performed before January 1, 1957, is creditable for Social Security purposes only if credit is not being given for the same service under another Federal retirement system. It stated that the SSA cannot credit military service before January 1, 1957, if a benefit under the Civil Service Retirement System is based in part on the same period of military service. OPM explained that under Pub. L. No. 84-854, if an individual has title to a civil service annuity, military service before January 1, 1957, must be used for civil service retirement purposes, and cannot be credited toward Social Security benefits. It asserted that the annuitant has no choice in this regard.

OPM stated that there is no provision of law that will allow it to delete the appellant's military service and also that the survivor annuity requested by the appellant was based on the appellant's "earned" annuity rate. OPM explained that the "earned" annuity rate is the rate that the appellant was entitled to based on his actual service time, and not a minimum annuity rate. OPM related that removal of the military service from the appellant's annuity computation or not including it, would adversely affect the amount of the survivor annuity. Appeal File, tab 5, subtab 2.

A review of the evidence does not support the appellant's contentions that OPM can delete his military service from its computations. The Public Law sections cited by the appellant do not indicate that the agency's determination to include his military service in a determination of his annuity was improper. Although the Pub. L. No 84-854, Section 4 (d), states that no credit shall be allowed for the service covered by the refund until the deposit is made, the appellant has not shown that OPM used any service relevant to that section in a determination of the service to be used in the computation of his annuity.

The decision in *Tirado* states that military service cannot be counted in measuring a Federal employee's initial eligibility for disability retirement, although military service can be counted in defined circumstances in computing the amount of proper retirement annuity to which an applicant is entitled. *Id.* at 264. In this case, OPM determined that the appellant had the requisite service to qualify for a disability annuity. The appellant's military service, however, was used in the computation of his proper retirement annuity.

The statue cited by OPM states that credit "shall" be allowed for periods of military service prior to the date of separation. The appellant has shown no statutory authorization to exclude his military service from the computation of his annuity. The plain meaning of the word "shall" requires that military service be included in the calculation of the annuity. *See Karpen v. Office of Personnel Management,* 39 M.S.P.R. 422, 424 (1989). Under these circumstances, OPM cannot exclude the appellant's military service in the computation of his annuity merely at his request. Accordingly, I find that the appellant has failed to show by preponderant evidence that his military service performed prior to December 31, 1956, should not be included in his annuity credit:

The appellant has not shown discrimination on the part of the agency.

The appellant alleged discrimination on the part of the agency because of his mental condition and his "Spanish's Jewish's name of Fermin." Appeal File, tab 1. The appellant bears the burden of proof on his affirmative defense. 5 C.F.R. § 1201.56 (2) (iii) (1991). The appellant admitted that he did not have any evidence to support these allegations, other than the agency's alleged confusion and incorrect determination. Appeal File, tab 1. Upon my review of the record, I find no evidence to support the appellant's claims. Accordingly, I find that the appellant has failed to show discrimination on the part of the agency in this matter.

DECISION

The agency's reconsideration decision is AFFIRMED.

FOR THE BOARD:

U. Sidney Cornelius, Jr.

U. Sidney Cornelius, Jr.
Administrative Judge

NOTICE TO APPELLANT

This initial decision will become final on **July 4, 1991,** unless a petition for review is filed by that date or the Board reopens the case on its own motion. This is an important date because it is the last day on which you can file a petition for review with the Board. The date on which the initial decision becomes final also controls when you can file a petition for review with the Court of Appeals for the Federal Circuit. The paragraphs that follow tell you how and when to file with the Borad or the federal court. These instructions are important because if you wish to file a petition, you must file it within the proper time period.

BOARD REVIEW

You may request Board review of this initial decision by filing a petition for review. Your petition for review must state your objections to the initial decision, supported by references to applicable laws, regulations, and the record. You must file your petition with:

The Clerk of the Board
Merit Systems Protection Board
1120 Vermont Avenue, NW., Suite 802
Washington, D.C. 20419

Your petition must be postmarked or hand-delivered no later than the date this initial decision becomes final. If you fail to provide a statement with your petition that you hav either mailed or hand-delivered a copy of your petition to the agency, your petition will be rejected and returned to you.

JUDICIAL REVIEW

If you are dissatisfied with the Board's final decision, you may file a petition with:

The United States Court of Appeals
for the Federal Circuit
717 Madison Place, NW
Washington, D.C. 20439

You may not file your petition with the court before this decision becomes final. To be timely, your petition must be **received** by the court no later than 30 calendar days after the date this initial decision becomes final.

NOTICE TO AGENCY/INTERVENOR

AThe agency or intervenor may file a petition for review of this initial decision in accordance with the Board's regulations.

CERTIFICATE OF SERVICE

I certify that the attached Document(s) was (were) sent by regular mail this day to each of the following:

Appellant
Mr. Frederick C. Fermin
13906 Norland Drive
San Antonio, TX 78232

Agency's Representatives
Ms. Connie E. Torrillo
Retirement Policy Division
Office of Personnel Management
P.O. Box 16
Washington, D.C. 20044

Other
Ms. Majorie Marks
U.S. Office of Personnel Management
Employee Relations Division
1900 E. Street NW, Room 7412
Washington, D.C. 20415

Gwendolyn Renee Moss
Gwendolyn Renee Moss
Legal Clerk

May 30, 1991
(date)

DEPARTMENT OF HEALTH, EDUCATION, AND WELFARE

CERTIFICATION BY FEDERAL AGENCY AS TO PAYMENTS ON ACCOUNT OF VETERAN

202

In connection with an application for social security benefits filed on the account of the veteran named herein and based at least in part on active service in the Uniformed Services of the United States after September 15, 1940, and before January 1, 1957, please complete this form as instructed and return it to the Social Security Administration at the address shown.

SOCIAL SECURITY ADMINISTRATION
Bureau of Retirement & Survivors Insurance
Entitlement Division -Rm 642
Security Blvd.
Baltimore, Md. 21235
Please forward to proper office

DATE 6-5-71

NAME OF VETERAN	
Frederick C. Fermin	
SOCIAL SECURITY NUMBER	
564-24-9059	
DATE OF BIRTH	DATE OF DEATH
7-17-25	
BRANCH OF SERVICE	SERVICE NUMBER
Air Force	RA 36567060
PERIOD(S) OF ACTIVE UNIFORMED SERVICE	
March 29, 1941 to Sept. 17, 194 May 29, 1946 to Feb. 5, 194	
FEDERAL BENEFIT CLAIM NO.	DATE CLAIM FOR FEDERAL BENEFIT FILED
DSA - 462 317	

NAME OF FEDERAL EMPLOYER	WHERE EMPLOYED	DATE LAST EMPLOYED
USAF, Travis, AFB, Ca.	Travis, AFB, Ca	6-4-71 ☐ PRESENT

CERTIFICATION BY FEDERAL AGENCY

1. *(a)* If a claim has not been filed with your agency check here ☐ and return both copies of the form.
(b) If a claim has been filed but the determination is pending, check here ☐ and return the original copy. When the determination is made, fill in the applicable items on the duplicate copy of the form and return it.

2. Please indicate, by checking the proper block or blocks, the type(s) of benefit award(s) determined to be payable by your agency on the basis of the above veteran's account. If no such benefit *is* or *has been* payable, check "None," and no other item need be answered. See instructions on reverse.

(a) ☒ Retirement annuity (whether based on service, age, or disability)
(b) ☐ Survivor annuity
(c) ☐ Lump sum in lieu of periodic benefit
(d) ☐ Periodic payment in lieu of lump sum
(e) ☐ Lump sum which is not in lieu of periodic bene
(f) ☐ Potential widow's annuity
(g) ☐ None

ANSWER THE FOLLOWING ITEMS ONLY IF 2 *(a)*, *(b)*, OR *(c)* ABOVE HAS BEEN CHECKED.

3. *(a)* Was active service in the Uniformed Services after September 15, 1940, and before July 25, 1947, necessary to establish eligibility to receive any of the approved awards? ☐ Yes ☒ No
(b) Was active service in the Uniformed Services after July 24, 1947, and before January 1, 1957, necessary to establish eligibility to receive any of the approved awards? ☐ Yes ☒ No

4. *(a)* Was active service in the Uniformed Services after September 15, 1940, and before July 25, 1947, used in computing the amount of any of the approved awards? ☒ Yes ☐ No
(b) Was active service in the Uniformed Services after July 24, 1947, and before January 1, 1957, used in computing the amount of any of the approved awards? ☐ Yes ☒ No

5. If any subitem in item 3 or 4 is answered "Yes," please give the citation of law or regulations under which the award was approved 5 USC

REMARKS

Military was use effective 4.1.71 with the annuitant election for a survivor annuity which must be based on all of his service including his military even though his annuity is still a WOF guaranteed minimum. ZGK This revises our form CA-6555 dated 1-16-70.

ORGANIZATION	SIGNATURE	DATE
USSSC DEIG H Wash DC 20415	Claude R. Holmes TITLE Claims Examiner	9-8-71

FORM SSA-655 (10-69)

BEST AVAILABLE COPY

STANDARD FORM NO. 2801
AMENDED AUGUST 1966
CHAPTER 831 C.S.R.

APPLICATION FOR RETIREMENT
CIVIL SERVICE RETIREMENT SYSTEM

FORM PRESCRIBED BY COMPTROLLER GENERAL, U.S. AUGUST 31, 1966

To avoid delay in processing claim—1. Read information carefully; 2. Complete application in full; 3. Typewrite or print in ink.

1 NAME (Last) (First) (Middle)	2 LIST ALL OTHER NAMES YOU HAVE USED	3 DATE OF BIRTH (Month) (Day) (Year)
Fermin, Frederick C.		7-13-25

4 ADDRESS (Number and street) (City and zone number) (State)

358 Rutland Avenue, San Jose, California

5 DEPARTMENT OR AGENCY IN WHICH PRESENTLY OR LAST EMPLOYED, INCLUDING BUREAU OR DIVISION	6 LOCATION OF LAST EMPLOYMENT (City and State)	7 TITLE OF LAST POSITION
USAF, Travis AFB 1501st Air Transport Wing(MATS)	Travis AFB, California	AC Mechanic, WB-15

8 DATE OF FINAL SEPARATION (Month) (Day) (Year)	9 DO YOU HAVE FEDERAL EMPLOYEES' GROUP LIFE INSURANCE?	10 APPROXIMATE NUMBER OF YEARS OF CIVILIAN SERVICE
Presently Employed	☒ YES ☐ NO	6 Years 6 Months

11. (A) ARE YOU A CITIZEN OF THE UNITED STATES OF AMERICA? ☒ YES ☐ NO — 11. (B) IF THE ANSWER IS "NO," OF WHAT COUNTRY ARE YOU A CITIZEN?

12. (A) ARE YOU MARRIED?	12. (B) IF THE ANSWER IS "YES," GIVE THE FOLLOWING INFORMATION:				
☐ YES ☐ NO	WIFE'S OR HUSBAND'S NAME (First) (Middle)	HER (OR HIS) BIRTH DATE (Month) (Day) (Year)	DATE OF MARRIAGE (Month) (Day) (Year)	PLACE OF MARRIAGE (City and State)	MARRIAGE PERFORMED BY ☐ CLERGYMAN OR ☐ JUSTICE OF THE PEACE ☐ OTHER (Specify)
Present Status Divorced			07 Mar 57	CSC	

Only applicants for disability retirement will complete item 13

13. (A) WHEN DID YOU BECOME TOTALLY DISABLED? (Month and year)	13. (B) BRIEFLY DESCRIBE YOUR DISABILITIES, WHEN AND HOW INCURRED, AND HOW THEY INTERFERE WITH PERFORMANCE OF THE DUTIES OF YOUR POSITION
April 1957	See attached copy of Court Order

14. (A) IF YOU HAVE RENDERED ACTIVE SERVICE IN THE ARMY, NAVY, MARINE CORPS, AIR FORCE, OR COAST GUARD OF THE UNITED STATES, AND YOUR SERVICE WAS TERMINATED UNDER HONORABLE CONDITIONS, COMPLETE THE FOLLOWING SCHEDULE. ATTACH A COPY OF YOUR DISCHARGE CERTIFICATE IF AVAILABLE.

BRANCH OF SERVICE	SERIAL NO.	DATE OF ENTRANCE ON ACTIVE DUTY	DATE OF SEPARATION FROM ACTIVE DUTY	LAST GRADE OR RANK	ORGANIZATION AT DISCHARGE (Div., Regiment, Co., etc.)
Army Air Corps	RA 38067069	29 Mar 41	27 Sep 45		
Air Force	RA 38067069	29 May 46	5 Feb 47		

14. (B) ARE YOU IN RECEIPT OF OR HAVE YOU APPLIED FOR MILITARY RETIRED PAY? (Do not report pay from any employment or compensation)	14. (C) IF YOUR ANSWER IS "YES," WERE YOU RETIRED FROM A RESERVE COMPONENT UNDER TITLE III, PUBLIC LAW 810, 80TH CONGRESS?	14. (D) IF YOU WERE IN THE MILITARY SERVICE ON OR AFTER JANUARY 1, 1957, GIVE YOUR SOCIAL SECURITY NUMBER.
☐ YES ☒ NO	☐ YES ☐ NO	

15. (A) HAVE YOU EVER RECEIVED OR MADE APPLICATION FOR COMPENSATION UNDER THE FEDERAL EMPLOYEES' COMPENSATION ACT?	15. (B) IF THE ANSWER IS "YES," STATE THE NUMBER OF YOUR COMPENSATION CLAIM AND THE PERIOD FOR WHICH YOU RECEIVED COMPENSATION		
	CLAIM NUMBER	FROM (MONTH, DAY, YEAR)	TO (MONTH, DAY, YEAR)
☐ YES ☒ NO			

16. (A) HAVE YOU PREVIOUSLY FILED ANY APPLICATION UNDER THE CIVIL SERVICE RETIREMENT SYSTEM INCLUDING APPLICATION FOR RETIREMENT, REFUND, SERVICE CREDIT OR VOLUNTARY CONTRIBUTIONS?	16. (B) IF THE ANSWER IS "YES," INDICATE THE TYPE(S) OF APPLICATION AND GIVE THE CLAIM NUMBER(S) IF KNOWN	
☐ YES ☒ NO	☐ RETIREMENT ☐ SERVICE CREDIT ☐ REFUND ☐ VOLUNTARY CONTRIBUTIONS	CLAIM NUMBER(S)

17. (A) HAVE YOU EVER BEEN EMPLOYED UNDER ANOTHER RETIREMENT SYSTEM FOR FEDERAL OR DISTRICT OF COLUMBIA EMPLOYEES?	17. (B) IF THE ANSWER IS "YES," GIVE THE NAME OF THE OTHER RETIREMENT SYSTEM
☐ YES ☒ NO	

(CONTINUE OTHER SIDE)

BEST AVAI

Your answer to the next question is your election of the type of annuity you wish to receive. Read the explanation of each type of annuity and consider the matter carefully before you write your answer. No change in election will be permitted after an annuity has been granted.

TO INDICATE BY AN "X" IN THE APPROPRIATE BOX A, B, OR C, BELOW THE TYPE OF ANNUITY YOU ELECT TO RECEIVE. IF YOU ELECT TYPE B OR C, BE SURE TO FILL IN THE OTHER INFORMATION CALLED FOR.

A. [X] ✓ **LIFE ANNUITY**

- This type is available to all retiring employees.
- It provides annuity payments to you only.

B. [ ] **REDUCED ANNUITY WITH BENEFIT TO WIDOW OR WIDOWER**

- This type is available to all retiring married employees.
- It provides a reduced annuity to you and a survivor annuity to your wife or husband.
- The survivor's annuity will begin upon your death and end when she (or he) dies or remarries.
- ← The survivor's annuity will be 50% of all or whatever portion of your annuity you specify as a base for this benefit. (If you are retiring for disability, you can elect all or any portion of your "earned" annuity as a base for the survivor's benefit: You cannot use as a base any of the annuity which may be payable to make up your guaranteed minimum benefit.)
- If your wife or husband should die before you, no change in election will be permitted, your annuity will not be increased, nor may you name any other person as survivor.

SPECIFY THE PORTION OF YOUR ANNUITY WHICH YOU ELECT TO USE AS A BASE FOR YOUR WIDOW'S OR WIDOWER'S ANNUITY. SHE (OR HE) WILL RECEIVE 55% OF THE PORTION YOU SPECIFY

[ ] ALL	REDUCTION WILL BE 2½% OF FIRST $3 400 OF YOUR ANNUITY PLUS 10% OF ANY AMOUNT OVER $3 400
[ ] $3 400, OR ALL IF LESS	REDUCTION WILL BE 2½% OF $3 400 OR OF ALL YOUR ANNUITY, IF LESS
[ ] ANY OTHER AMOUNT (Specify) $	REDUCTION WILL BE 2½% OF FIRST $3 400 OF YOUR ANNUITY PLUS 10% OF ANY AMOUNT OVER $3 400

C. [ ] **REDUCED ANNUITY WITH BENEFIT TO PERSON HAVING AN INSURABLE INTEREST**

- This type is available to all retiring unmarried employees who are in good health.
- It provides a reduced annuity to you and a survivor annuity to the person named as having an insurable interest.
- The survivor's annuity will begin upon your death and end when he (or she) dies.
- The survivor's annuity will be 50% of the reduced

SPECIFY THE NAME, RELATIONSHIP AND DATE OF BIRTH OF THE

Mr. Fermin is service connected and receives disability compensation from the Veterans Administration. Monthly payments are $202.00 at the present time.

therein is a violation of the law punishable by a fine of not more than $10,000 or imprisonment of not more than 5 years, or both (62 Stat. 698; 18 U. S. C. 287).

✓ June 28, 1957 (DATE) GUARDIAN OF THE ESTATE OF

FOR USE OF THE EMPLOYING DEPARTMENT OR AGENCY
(See Chapter 831 of the Federal Personnel Manual for instructions)

PLACE "X" IN APPROPRIATE BOX BELOW.

- [ ] THE APPLICANT NAMED ABOVE IS NOW SERVING IN A POSITION SUBJECT TO THE RETIREMENT ACT.
- [X] INDIVIDUAL RETIREMENT RECORD, STANDARD FORM NO 2806, AND REGISTER OF SEPARATIONS AND TRANSFERS, STANDARD FORM NO 2807, ARE ATTACHED HERETO.
- [ ] INDIVIDUAL RETIREMENT RECORD, STANDARD FORM NO 2806, WAS SENT TO U. S. CIVIL SERVICE COMMISSION ON _____ (DATE) WITH REGISTER OF SEPARATIONS AND TRANSFERS, STANDARD FORM NO 2807, NO _____

Civilian Personnel Officer (OFFICIAL TITLE)

28 June 1957 (DATE) Department of the Air Force

ABLE COPY

ORIGINAL

RECEIPT FOR PAYMENT

United States Court of Appeals
For The Federal Circuit

OFFICE OF THE CLERK

Received From: Frederick S. Fenton
(NAME)
2440 Interior TX 76205
(ADDRESS)

91-3562 (CASE NO.) Fenton v. [illegible] (SHORT TITLE) 9-11-91 (DATE)

ACCOUNT	AMOUNT
Clerk's Fee for docketing case	100 00
Certificate of membership	
Certified copy of 91-3562 DK	
Subscription fee	
Copy of opinion	
TOTAL	100 00

Clerk ☐
Deputy Clerk ☑ [illegible]
☐

Cash ☐ Check ☑ MONEY ORDER ☐

26290

BEST AVAILABLE COPY

AMENDMENT 5, TO THE UNITED STATES CONSTITUTION

"All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are Citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of Citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process law, nor deny to any person within its jurisdiction the equal protection of the laws."